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No. 87-1150

In The

Supreme Court of the United States

OCTOBER TERM, 1987

MARION S. BARRY, JR., *et al.*
Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

1. Whether a non-party with no showing of injury to anyone may appeal from a consent decree resolving a Title VII challenge to the hiring provisions of a voluntary affirmative action plan?

2. Whether persons interested in Title VII litigation may bring a collateral attack on a consent decree instead of intervening in the litigation when they have notice of the Title VII litigation, and the collateral complaint is filed almost ten months after approval of the consent decree?

3. Whether the United States, who cannot be granted the relief they request, has standing to bring a collateral attack?

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OPPOSITION TO PETITION FOR A
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COUNTER-STATEMENT OF THE CASE

INTRODUCTION

The critical issue presented in this case is whether the District of Columbia's prior employment policies practices by its Fire Department bear directly on the constitutionality of any race-conscious remedy proposed in its voluntary affirmative action plan. A second issue is whether these consolidated cases had become moot prior to

oral argument before the Court below. Other issues involve the administration of a consent decree.

Due to the unusual procedural turns this case has taken as a result of the actions of the District of Columbia and the United States, the Hammon parties have not yet had an opportunity to be heard below on the factual questions which have now become so central to their relief claims (43a, n37).

As a result of the unsettled record below, on a 28 U.S.C. § 1291(a)(1)(1982) appeal by the United States from a pre-trial order which addressed cross-motions for summary judgment on the issue of the legality and constitutionality of a proposed affirmative action plan voluntarily adopted by a public employer (127a), the descriptions of the trial court record contained in the briefs of the United States, the Byrne

intervenors and the District of Columbia (the three independent actions were consolidated for purposes of the cross-motions for summary judgment (126a-127a)) were both inaccurate and misleading and led to the judgments of February 27, 1987 (1a-78a), August 14, 1987 (80A-123a), and March 4, 1988 (App. Supp. 1a-3a), and said inaccuracies alone require said judgments to be vacated and the case remanded to the district court for further proceedings.

1. The Hammon Litigation

The procedural history of the Hammon case is set out in the district court's April 1, 1985 Opinion and Order (126a-158a), April 26, 1985 Order (159a-163a) and the court of appeals September 5, 1985 Orders (H4).

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1. "H" numbers refers to the Hammon Opposition Appendix, "a" numbers refer to petitioners' appendix and supplemental brief appendix.

Certain portions of the procedural history overlooked by the court of appeals include:

That in November 1983, the District Office of Human Rights (an EEOC deferral agency established to enforce and implement the provisions of Title VII), entered a final order requiring, inter alia, the District to develop and validate a new entrance examination for firefighters; to exhaust the 1980 eligibility list; to grant retroactive seniority to persons hired from the 1980 list;and to adopt and implement an affirmative action plan for the Fire Department (129a).

In March 1984, the District of Columbia conducted an entry level examination (134a). The examination had a disparate impact on blacks if selections were made on the basis of rank order, as was the practice of the District of Columbia in its operations of the Fire Department.

A total of 1,626 persons took the test in 1984, of whom 1,050 (64.6%) were black, 492 (30.3%) were white, and 84 (5.1%) were Hispanic or others. Of those 1,626 who took the test, a total of 1,384 persons passed the examination, of whom 830 (60%) were black, 486 (35.1%) were white, 33 (2.4%) were HIspanic, and 35 (2.5%) were others. Of those who passed, 1,287 (93%) were males and 96 (6.9%) were females. The examination has not been validated, and there is no evidence demonstrating that those who score higher on the examination are more likely to perform better on the job than those who score lower on the test. (Joint Stipulation ¶ 29). This is consistent with the findings of the Hearing Examiner.

The adverse impact of the 1984 test becomes apparent if selections were to be made on the basis of rank order. Rank order use would result in the following selections:

--of the first 100 passing applicants, 79 white males, 12 black males, 3 white females, 4 Hispanic males, 1 Hispanic female, and 1 unspecified male;

--of the next 100 passing candidates, 67 white males, 24 black males, 2 white females, 2 black females, 2 Hispanic males, 3 unspecified males;

--of the next 100 passing candidates, 55 white males, 36 black males, 2 white females, 1 black female, 2 Hispanic males, and 4 unspecified males;

--of the next 100 passing candidates, 52 white males, 37 black males, 3 white females, 4 black females, 1 Hispanic male, 1 Hispanic female, and 2 unspecified males.

On March 22, 1984, four black applicants for hire with the Fire Department, and the Progressive Firefighters Association, filed suit in this Court against the Mayor of the District of Columbia, the Director of the D.C. Office of Personnel, and the Fire Chief. Hammon v. Barry, C.A. 84-0903. The complaint sought, inter alia, enforcement of the November 16, 1983 Final Order issued by the Appellate Officer at the administrative level of the case (129a).

On May 23, 1984, this Court entered a Consent Decree in the Hammon case (H1). In the Consent Decree the defendants agreed to validate an entry level firefighter examination in accordance with the Uniform Guidelines, to submit a proposed affirmative action plan to the Court and to OHR, and to validate other components of the firefighter selection process. The Consent Decree also authorized the defendants to hire from the 1984 entry level examination list only after exhausting the 1980 eligible list. (129a-130a).

On February 7, 1985, pursuant to paragraph 5 of the Consent Decree, the Fire Department submitted to the court the affirmative action plan covering hiring and promotions. The District at that time reported to the court that the plan was already in effect. On March 8, 1985, five black firefighters were promoted pursuant to

the provisions of the plan (130a). The same day, eight white incumbent firefighters and their union (Local 36) filed suit challenging the promotion provisions of the affirmative action plan on the grounds that they violated Title VII and the Fifth Amendment's Due Process Clause, Byrne v. Coleman, C.A. No. 85-0782 (D.D.C.) (130a). The United States filed suit on March 11, 1985, challenging the legality and constitutionality of both the hiring and promotion provisions of the plan, United States v. District of Columbia, C.A. No. 85-0797 (D.D.C.) (130a).

At a status conference on March 12, 1985, the District Court made clear that under paragraph 5 of the Consent Decree, the plan promulgated by the District was not in effect, as that paragraph required prior approval of the Court (131a, H5-H14).

By Order of March 14, 1985, the Court consolidated the three cases, placed the

parties counsel on an expedited schedule due to the urgent nature of the case and public safety concerns, and suggested that the United States intervene in the Hammon case (H12). The various parties filed cross-motions for summary judgment on the limited issue of whether or not a voluntary affirmative action plan of a public employer could legally and constitutionally contain preferences based on race, color, or sex (131a).

On March 26, 1985, the Byrne motion to intervene in the Hammon case (the underlying litigation) was granted.

The United States, in C.A. No. 85-0797, never sought to intervene in the Hammon case and never presented a factual record of their claims (H1-H4).

The Hammon motion to strike the complaint of the United States as moot, filed on March 18, 1985 in the consolidated cases, was not ruled on by the district court (Id.).

On April 1, 1985, the District Court entered an opinion and order finding that the hiring aspects of the proposed plan satisfy the minimal requirements of Title VII and the Constitution and reluctantly approved the hiring aspects of the plan (156a). The court indicated that it could not approve the entire proposed plan as submitted (156a), and remanded the proposed plan to the District to be resubmitted within 45 days (158a). The District Court emphasized that when the plan was resubmitted to the court, it shall discuss alternative to any race-based or race-conscious process, and otherwise comply with the Civil Rights Act of 1964, as amended, and the United States Constitution (158a). On April 16, 1985, the District of Columbia noticed its appeal of the April 1 order and moved for a stay pending appeal (161a), of that portion of the order enjoining the hiring portion of the plan

(159a). The court granted a stay pending appeal on April 26, 1985, of only the declaration in the April 1, Order that the entire plan was invalid because a portion of the AAP was invalid, and ordered that these cases stand dismissed from the docket of the District Court for lack of jurisdiction pending possible remand from this Court (163a). The United States noted its appeal on May 30, 1985, from the April 1 and April 26 orders.

On September 5, 1985, the court of appeals dismissed the appeal of the District of Columbia and affirmed the April 26 stay (H4).

2. The District Court's Decision In Hammon

a. The Racial Composition of the Fire Department

Upon its consideration of the legality and constitutionality of the proposed affirmative action plan voluntarily adopted by the District of Columbia, the district

court in its April 1 order, includes findings that for many years the Fire Department discriminated against blacks. The district court noted a 1953 Policy Order of the Commissioners of the District of Columbia ordered the continuation of racial segregation of the separate white and black companies of the firefighting division of the Fire Department (131a) (H15 et seq). The court found that current statistics demonstrate that there still exists some vestiges of the aforementioned past discrimination (132a) in the racial composition of the ranks through Deputy Fire Chief (Id), and in the salary ranges (133a).

The district court concluded that the current racial composition of the Fire Department reflected past discrimination (143a). As of April 1984, approximately 62% of the uniformed members were white males and 37% were black males. White males also

predominated in the officer ranks and females comprised less than 2% of the force (132a). Because blacks as a group scored lower on the 1980 test, they also were substantially underrepresented among the top 300 names on the eligible list (128a).

In 1984, the District administered an entry level test substantially similar to the examination it had administered in 1980. The Court found that "the 1984 entry level examination had an adverse impact on blacks if selections were made on the basis of rank order" (135a). The parties stipulated that the examination had not been validated,and that it had not been demonstrated that those who scored higher would perform better on the job than those who scored lower.

The District proposed a plan for the Fire Department to comply with the OHR order of November 1983 and the 1984 Hammon consent decree for the period October 1, 1984 to October 15, 1986. The District's plan

mandated "a procedure for proportional appointment to the Department of test passers based on race, sex, and national origin" to eliminate the adverse impact which would result if the 1984 entry-level examination were used for rank order hiring (136a).[2] All of the black applicants took a discriminatory test, that had an adverse impact againt blacks, resulting in the selection for hire of 79 white males, 12 blacks males, 3 white females, and 0 black females of the first 100 ranking candidates (135a). The Court noted that some persons desiring to take the March 1984 examination

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2. Two proposed AAPs were submitted for the District Court's approval pursuant to the Consent Decree, one submitted by the Hammon plaintiffs on January 23, 1985, and the District's proposed plan submitted on February 4, 1985. The District Court in its April 1 order and opinion considered only the District's proposed voluntary plan. The Hammon proposed plan has not yet been considered by the court, it might not be considered to be a voluntary plan if approved.

were denied that opportunity because of limited seating capacity (134a), and that of the persons who took the test in 1984, 64.6% were black, 30.3% were white, of those who passed the test 60% were black and 35.1% were white (135a).

REASONS FOR DENYING THE WRIT

POINT I

The United States Court Of Appeals For The District of Columbia Circuit Lacked Jurisdiction To Hear The Appeal Of The United States From The Orders Of The District Court

In light of this Court's intervening per curiam decision, Marino v. Ortiz, Slip Op. No. 86-1415 (U.S. Jan. 13, 1988), because the United States was not a party to the underlying lawsuit, Hammon v. Barry, C.A. 84-0903, and because they failed to intervene for purpose of appeal, they lacked standing to appeal the factual predicate underlying the consent decree approving the lawsuit's settlement requiring the District of Columbia

to develop a proposed affirmative plan for hiring in the District of Columbia Fire Department.

It has been settled law for well over a century that "only a party of record in a lawsuit has standing to appeal from a judgment of the district court." See, e.g., United States ex rel. Louisiana v. Jack, 244 U.S. 397, 402 (1917); Fed., Rule App. Proc. 3(c).

Moreover, because the United States never assumed party status, there is no factual record on their claims. See Bender v. Williamsport Area School District, ___U.S. ___, 106 S. Ct. 1326, 1334-35 (1986). The United States has submited neither sworn pledings nor affidvaits describing their injury. Thus, because the United States was not a party in Hammon v. Barry, they lacked standing to appeal from the district court orders, and the court of appeals erred in their September 5, 1985 order denying the

motion to dismiss the appeal of the United Staes for want of jurisdiction (H4).

POINT II

THE UNIQUE FACTS OF THE HAMMON LITIGATION MAKE THE CASE UNWORTHY OF THIS COURT'S REVIEW

The unique facts of the Hammon ligitation make it inappropriate for review by this Court. The United States collateral suit was mooted out prior to the disrict court's orders of April 1 and 26, 1985, at a time when the court had invited petitioners to intervene. (H1-4). The United States collateral attack on the Consent Decree was therefore an entirely unnecessary duplicate procedural maneuver. Morever, the United States cannot be granted the relief they request and their claim must ultimately fail on the merits by virtue of this Court's recent decisions in this area. Accordingly, this case does not merit review.

A. The United States' Collateral Attack Ws Properly Declared Moot By The District Court And Their Appeal Should Have Been Dismised Where They Could Have Intervened In Hammon v. Barry But Deliberatrely Chose Not To.

On March 12, 1985, having heard arguments of counsel for all parties in the three cases filed against the petitioner District of Columbia, the district court determined that the said affirmative action plan was not in effect, but was a proposed plan for review, subject to the Court's approval (H1-H4). By virtue of the failure of the existence of more than a "proposed affirmative action plan," the Byrne complaint and the United States complaint were moot (Id.), including the United States claim for injunctive relief.

The Byrne and United States' plaintiffs were permitted to draw an amedned complaint and litigate the issues within the context of one suit (Id.), retaining the Hammon case as the basis for the record thus far,

to withdraw the Byrne case and the United States case filed on March 11, 1985 and to present their claims by cross-motions for summary judgment, supported, if necessary, by affidavits or other evidence suitable under Rule 56 of the Fed. Rules of Civ. Proc.

The Byrne plaintiffs wre permitted to intervene in both the Hammon case and the action filed by the United States, C.A. No. 85-0797 (H3).

The United States neither filed an amended complaint nor intervened in the Hammon case citing serious jurisdictional questions in the Hammon cas (H 8).

Thus the United States had no standing to appeal the decision of the district court on the narrow issue before the court on cross-motions for summary judgment.

Although the district court advised the United States of their various options "so that each one of you will know the basis for the venue, the basis for the jurisdiction, and the basis for the claims, whether it be under Title VII, 1981, 1983, ADEA, meaning the Age Discrimination in Employment Act, because that is encompassed by the earlier stages of this case" (H5-14), the United States deliberately chose not to and proceeded to launch their collateral attack on the consent decree, in violation of the rule "collateral attacks on consent decrees entered in Title VII actions are not permitted." This rule has been adopted by every Circuit to confront the issue squarely. See Thaggard v. City of Jackson, 687 F.2d 66 (5th Cir. 1982), cert. denied sub nom. Ashley v. City of Jackson, 464 U.S. 900 (1983); Stotts v. Memphis Fire Dep't., 679 F.2d 541 (6th Cir. 1982), rev'd no other grounds sub nom, Firefighters Local

Union No. 1784 v. Stotts, 467 U.S. 561 (1984).

The rule against collateral attacks on Title VII consent decrees prevents lawsuits that

> would raise the specter of inconsistent or contradictory prceedings, would promote continued uncertainty thus undermining the concept of a final judgment and would violate the policy of promoting settlement in Title VII actions.

Marino v. Ortiz, 806 F.2d at 1146.

While these policies behind the collateral attack rule required dismissal of the Marino complaint, on the peculiar facts of this case the United States are also equitably precluded from mounting a collateral attack. The United States could have made a timely motion to intervene in Hammon, as did the Byrne parties.

Moreover, when the United States filed its complaint the Hammon plaintiffs moved to dismiss on the ground, among others, that the

United States had failed to amend its complaint or assert any "live" issue (H3).

Further, as the district court, permitted "other individual fire officers and white unions members to intervene as parties (Id.), in the these circumstances, the United States could not have believed that a motion to intervene would have been futile.

The United States was not denied its day in court. The United States actually presented their claims at the summary judgment hearing in Hammon v. Barry. The District Court considered and responded to their claims; if the United States had actually intervened they would have been entitled to no more. See Local No. 93 v. City of Cleveland, ___U.S.___, 106 S. Ct. 3063, 3079 (1986), but they had no standing to appeal the district court's orders.

Moreover, the United States cannot argue that they need not have intervened without ignoring the peculiar facts of this case. As

this Court suggested thirty years after its decision in Chase, when a nonparty was aware of litigation but "purposely bypassed an adequate opportunity to intervene", the nonparty can be estopped from bringing a collateral attack.

Further, as the United States must necessarily concede, the harm anyone could allege was limited to the short life of the plan, October 1, 1984 to October 15, 1986. An applicant will remain eligible to compete for the available positions once a new examination is offered. United States v. Paradise, 55 U.S.L.W. 4211, 4221 (1987) (Powell, Jr., concurring).

Finally, the Title VII preference for voluntary compliance argues in favor of barring a subsequent suit by any nonparty who was aware of the Title VII litigation in time to intervene and were specifically advised to intervene but chose instead to bring a

collateral attack. See Wygant v. Jackson Board of Education, ___U.S.___, 106 S. Ct. 1842, 1855 (1986) (O'Connor, J. concurring) ("The value of voluntary compliance is doubly important when it is a public employer that acts ...."); Johnson v. Transportation Agency, 55 U.S.L.W. 4379, 4383 (1987) (construing Title VII so as not to require the employer to invite litigation before adopting affirmative action plan), as the District of Columbia did in this instance. The District's attempts failed when the district ruled that no affirmative action plan was in effect, only a "proposed plan" (131a).

B. Even If A Collateral Attack Were Appropriate, Review By This Court Would Not Be Warranted Because The United States And Petitioners Cannot Be Granted The Relief They Request And Their Claims Are Meritless

The United States complaint sought to enjoin hiring pursuant to the proposed affirmation action plan for the District's

Fire Department. They cannot obtain that relief. Even if the consent decree were found unconstitutional, the proposed plan and the stay permitting hiring pursuant thereto expired, by its own terms, on October 15, 1986, prior to oral argument before the court of appeals on October 22, 1986. Although petitioners, District of Columbia, sought to extend the life of said proposed plan, by motion of November 10, 1986 the district court denied permission to extend the plan on December 10, 1986 (H3-4). Thereafter on May 26, 1987, the district court ordered the District of Columbia to submit a new proposed affirmative action plan covering hiring and promotions. The District submitted the new plan on June 26, 1987. The new proposed plan does not contain the hiring provisions the United States sought to enjoin. Said proposed plan now awaits a ruling by the district court.

In any event, the United States' complaint is meritless. The uncontroverted facts of the Hammon case involves the present effects and impact of the de jure segregation of this Fire Department and the District's duty to dismantle that dual system (H15 et seq.). The consent decree merely provided for interim relief to allow the City to meet its critical public safety needs (162a), by making firefighter appointments that do not have a disparate impact on black or minority test takers. The hiring provisions only benefited applicants who took the exam and it was to have expired once a new examination was offered, and it did expire more than a year ago. Short term interim relief of this type is clearly proper. See, e.g., Kirkland v. New York State Dept. of Correctional Services, 711 F.2d 1117, 1134 (2d Cir. 1983), cert. denied 465 U.S. 1005 (1984).

The scope of the decree is properly restricted since it will do no more than

correct the disparate impact of the hiring exam. See Johnson v. Transporation Agency, supra, 55 U.S.L.W. at 4384-85; United Steelworkers of America v. Wever, supra, 443 U.S. at 199. The decree did not unnecessarily trammel the rights of whites because they had no expectation of a job. Compare Johnson v. Transporation Agency, supra, 55 U.S.LW. at 4385 (worker passed over for promotion had no "absolute entitlement" to promotion). Thus, further review of this case is pointless because the United States and petitioners must ultimately lose on the merits of their claim.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

May 6, 1988

Respectfully submitted,

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TITLE: HAMMON, ET AL V BARRY, ET AL

CAUSE: 42 USC 2000(E); EMPLOYMENT DISCRIMINATION

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1984

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May 23
STATUS CALL: CASE SETTLED & DISMISSED. (Rep. M. Colchico) RICHEY, J. (la)

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May 24
14 CONSENT ORDER filed 5-23-84 SETTLING & DISMISSING action with terms. RICHEY, J. (la)

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1985

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Mar 13
STATUS CALL: parties agree to consolidate CA 84-903, 85-782 and 85-797; court directs parties to consider setting forth claims in one complaint and dismiss two newer suits; parties to follow schedule as directed: (1) stipulation of material facts not in dispute to be filed on 3/14/85 by 4 p.m.; cross motions for summary judgment by 3/18/85; by 4 p.m.; replies by 3/20/85 by 4 p.m.; hearing set for Saturday, March 23, 1985 at 10:00 a.m. (Rep: H. Deutsch) (Status call held 3/12/85). RICHEY, J. (mj)

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Mar 18
39 MOTION by pltfs. to dismiss the complaints of Kevin Byrne, et al. and the United States of America etc; P & A's . (mj)

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Mar 26
63 ORDER/granting leave for Local 36, International Association of Fire Fighters to intervene in CA 85-797 pursuant to FRCP 24(b). (N) RICHEY, J. (mj)

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Mar 26
65 ORDER filed 3/23/85 granting Local 36, International Association of Fire Fighters' motion to intervene in the Hammon case, CA 83-903, pursuant to FRCP 24(b). (N) RICHEY, J. (mj)

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Apr 1
COURT disapproves affirmative action plan and remands to the District of Columbia for further consideration; new plan to be resubmitted to the Court in forty-five days. RICHEY, J. (mj)

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1987

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Apr 22
213 ORDER filed 4/21/87 directing that the defendant D.C. to prepare a revised draft of Affirmative Action Plan no later than 5/21/87; directing that a final plan be completed and filed with the Court on or before June 6, 1987. RICHEY, J. (kc)

****

Apr 23
214 ORDER filed 4/22/87 granting motion of pltfs. for leave to amend the complaint; directing that the amended complaint be filed. (N) RICHEY, J.

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Jun 26
243 NOTICE by defendants of filing the attached copy of their Affirmative Action Plan for the D.C. Fire Department; attachment.

****

Nov 10
179 MOTION by defts for approval of the extension of the District of Columbia Fire Department's entry level affirmative action plan; attachment.

****

Dec 10
186 ORDER Filed 12/2/86 denying without prejudice defts' motion for approval of the extension of the District of Columbia Fire Department's Entry Level Affirmative Action Plan and with right of defts to submit the same or a similar motion subsequent to exhaustion of the appellate process;

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MARVIN K. HAMMON, ET AL., Plaintiffs, VS. DISTRICT OF COLUMBIA, ET AL., Defendants.	Civil Action No. 84-903
UNITED STATES OF AMERICA, Plaintiff, VS. DISTRICT OF COLUMBIA, ET AL., Defendants.	Civil Action No. 85-797
	Courtroom No. 11 Washington, D.C.
	Tuesday March 12, 1985

The above-entitled matter came on for a Status Call before The Honorable CHARLES R. RICHEY, United States District Judge, commencing at 10:07 a.m

****

THE COURT: And the Court is going to sign, since you have reluctantly consented, an order of consolidation, which I'll ask Mr. Suda to prepare along with his answers in all of these cases, and I would inquire of counsel, if this wouldn't thereby moot out, since we're going to do these in one joint effort on the consolidated basis, if we can't perhaps dismiss in whole or in part one or more of these cases, and just perhaps redraw a complaint that will set forth this whole matter in one discrete form, setting forth the disparate issues, discrete issues that Ms. Burt, the union, the United States and the District of Columbia wish to have resolved and resolved promptly? We don't need four lawsuits here or even three. We need one. We ought to do it with the understanding that the record developed thusfar in the Hammon case will be extant, viable and outstanding up to and including this date. Anybody have any thoughts about that? The United States just says it's contrary to Title VII and the Constitution, any affirmative action plan. I say to you, there is no such affirmative action plan at this moment.

****

THE COURT: Because the Court hasn't approved one. If you read the consent decree, I'm sure you'll agree with that, and it's even more true by virtue of what took place in this courtroom this morning as well as this afternoon.

MR UGELOW: Your Honor, all I know is that the city filed a document with the Court saying that the affirmative action plan was in effect.

THE COURT: Well, you've heard what the Government said today, so that makes it moot, your suit right at this moment. There is no case or controversy, is there?

MR. UGELOW: Well, the fact is that the city did promote five firefighters to a sergeant in accordance with that plan.

THE COURT: That doesn't mean that that was a valid promotion at all at this moment, does it?

MR UGELOW: That's correct, Your Honor.

THE COURT: Because of the very terms of the consent

decree; isn't that correct?

MR UGELOW: In accordance with what the Court said this morning, that is certainly correct.

THE COURT: Don't you read it the same way?

MR. UGELOW: Well, I do now, Your Honor.

THE COURT: All right.

Don't your agree, Mr. Cohen?

MR. COHEN: I understand that is the posture of this case at this time.

THE COURT: Don't you agree that that's correct?

MR. COHEN: I agree that is correct.

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THE COURT: But it's not, and even though somebody in your office — and I know you've got a big bureaucracy, a lot of people — somebody in your office or somebody associated with the District of Columbia Government called it a final plan or some similar words, that doesn't make it a final plan.

MR. SUDA: Your Honor did not approve it.

THE COURT: Therefore, there is no such plan; isn't that correct?

MR. SUDA: There is no approved plan, and we can handle this all in one case.

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Now finally, we've gotten some concessions that are appropriate and proper, that bring us together as good lawyers, hopefully, good judges.

Why can't the union get together, Mr. Cohen, with the Department of Justice, and draw an amended complaint or order, dismissing both the Government case that was filed last March 8th and — I mean the Byrne case that was filed March 8th, and the Government case that was filed yesterday, March 11th, and put it in one action by way of cross-claim or counterclaim, and retain the Hammon case as the basis for the record thusfar? Then we can do this by cross-claims and counterclaims, and we have one case.

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But I don't see why you people can't get together and assert that one action. I know what your purpose is, the Government's point of view. I know what you seek, too. You're almost in tandem with the Government, very similar complaints. Your complaints are practically identical in terms of what you want done here, the union and the Government. It's kind of unique to have the union agreeing with the United States.

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THE COURT: You handed me a letter from the Department of Justice this morning — I guess Mr. Reynolds — giving you the various firefighters cases, but I don't know whether the Government had access to what they've done in those cases. It's just a list of them. Do you have that, Mr. Ugelow?

MR. UGELOW: I know what's happened in some cases, certainly not all the cases. There have been motions filed — Rule 60(b)(5) motions filed to remove all preferences either in the consent decree or the court order.

THE COURT: Is that the way it's been done in all those cases?

MR. UGELOW: Continuing filings. The way the process has worked, Your Honor, is as follows. We've written letters to the defendants in the cases and asked to negotiate a change in the consent order or the Court order, and present that to the Court for its approval, and I believe only one motion has been filed as of this date, and that's in the United States vs. City of Buffalo.

THE COURT: Why didn't you file a motion, instead of filing an independent lawsuit? A lawsuit isn't even necessary. If you filed a motion to intervene in the Hammon case, then you don't need your independent lawsuit, do you, a la my conversation with Mr. Cohen?

MR UGELOW: Well, Your Honor —

THE COURT: You can intervene as a plaintiff as well as a defendant, can you not, under Rule 24?

MR. UGELOW: I understand that, Your Honor, but in our view — I'm reluctant to raise this issue at this time — there's a

serious jurisdictional question in the Hammon case.

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EVENING STAR
APRIL 17, 1948

Conroy Orders Another Ballot on Segregation

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Disclaiming responsibility for the resolution in favor of racial segregation in the District Fire Department, Capt. Joseph W. Conroy, president of the Washington local of the International Association of Fire Fighters, has scheduled two meetings of his organization tomorrow to put the question to a second vote.

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There are 52 Negroes serving in the District's 910-man department, according to Deputy Chief Frank G. Berry. They now are grouped in Engine Company 27 under Capt. James F. Mills, and in Engine Company 4 under Capt. Joseph Briscoe. The department has one colored lieutenant and two colored sergeants.

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EVENING STAR
OCTOBER 15, 1951

Firemen's Local Votes 664 to 35 For Segregation

Integration Assailed; Group Represents 3/4 of Blaze Fighters

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The vote of nearly all the membership of the Washington local, International Association of Firefighters (AFL), which held a special session yesterday, was 664 to 35 in favor of continuing the 30-year policy of racial segregation in the department.

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Just to make the record complete, the firemen's union also supported, 663 to 31, Representative Davis' resolution set aside the Commissioners' integration order, and, by 693 to 2, the same Congressman's resolution requiring competitive examinations for appointment of all officers of the force.

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Lt. Alvin E. Davis, president of the firefighters union, stated the majority case this way:

"The public and the Commissioners apparently don't realize that firemen on the job live like members of the same family.

"On duty hours, the men eat together, sleep in the same small bunk room, play cards together and shoot the bull together.

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"Other people can talk of ideals and principles all they please, but this idea of 'living' with some one of another race is something else again. They don't think of that.

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Although some members were bitter in criticizing Chief Mayhew's statements that "intergration" would be economical and that an earlier sample "poll" of the 1,040 firemen showed they favored the proposed new order, both meetings yesterday were generally quiet. Less than a dozen Negroes attended each session, it was reported, of the 106, Negroes in the department.

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THE WASHINGTON POST
OCTOBER 20, 1951

Integration Of Firemen Postponed

Commissioners Hold Up Order Until January Congress Session

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At the request of Chairman John L. McMillan of the House Distrist Committee, the commissioners yesterday agreed to hold up their racial integration order for the fire department until Congress returns in January.

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THE WASHINGTON POST
AUGUST 31, 1954

D.C. Orders Integration In Fire Dept.

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The District Commissioners yesterday ordered racial segregation in the Fire Department ended Wednesday.

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The order met immediate opposition from Capt. George A. Tacey, head of the Firemen's-Association, Local 36, AFL, composed of from 80 to 90 percent of the total 1075 local firemen.

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After initial transfers, the Commissioners plan to place new firemen from Civil Service lists wherever vacancies occur. The order did not contemplate that Negro officers would be placed over white firemen, it was stated.

Chief Sutton was understood originally to have urged overnight and near-equal mingling of white and Negro firemen throughout the city. Commissioner Samuel Spencer said the city had rejected any "violent" turnover in favor of a gradual and in a sense voluntary integration.

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WASHINGTON DAILY NEWS
FEBRUARY 12, 1969

D.C. Reorganizes Fire Dept.

Deputy Mayor Thomas Fletcher yesterday announced reorganization of the District Fire Department which will "benefit everybody – white and black." The move comes in the wake of charges of widespread discrimination in the department last fall.

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Answering other questions on discrimination in the Fire Department, Deputy Major Fletcher said that two complaints – segregation of bed and apparatus assignment and assignments to ambulance duty – were corrected immediately.

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THE WASHINGTON
POST
FEBRUARY 26, 1970

Order Allows Local 36 To Act for D.C. Firemen

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Mayor Walter E. Washington has signed an order that clears the way for giving the predominantly white local 36 of the firemen's union exclusive negotiating rights for the city's firemen.

A lawyer for the dissident black Progressive Firemen's Association immediately announced he would seek court action to block the move.

A group of black firemen withdrew from local 36 last September over alleged discrimination and formed the association.

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About 170 black members quit local 36 last September, charging discrimination in the competitive promotion of Negroes in the officers' ranks. There are about 20 black officers in the fire department.

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Segal said the Progressive Firemen's Association can still function as a paternal group within the department, having the power to appeal grievances directly to the fire chief or the mayor.

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THE WASHINGTON
POST
MARCH 18, 1970

Black Firemen Lose Bargaining Fight

Potomac Watch

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Last fall, most of the black members of the D.C. fire department withdrew from Local 36 of the International Association of Fire fighters, AFL-CIO.

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Ben Segal, who has been handling the matter for Mayor Washington suggests that the one-year limitation will put the city in a position to force reform of Local 36. But that seems unlikely. If the city could find no grounds for denying recognition this year, it won't have grounds next year either, even if the local makes no move whatever toward reform.

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Negro firemen have a long history of grievances against the local, including its opposition to racial integration of the department and a period of several years when blacks were barred from membership in the local.

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Another sore point may be a bit stickier. Many Negro firemen have complained that the union is inseparable from the department itself, since every member of the department is eligible for union membership.

Thus, they complain, grievances against department supervisors are heard by union officials who are themselves department supervisors.

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DISTRICT OF COLUMBIA CODE

§ 1-618.9. Unit determination

(b) A unit shall not be established if it includes the following:

(1) Any management official or supervisor: Except, that with respect to fire fighters, a unit that includes both supervisors and nonsupervisors may be considered: Provided, further, that supervisors employed by the District of Columbia Board of Education may form a unit which does not include nonsupervisors;

(2) A confidential employee;

(3) An employee engaged in personal work in other than a purely clerical capacity;

(4) An employee engaged in administering the provisions of this subchapter;

(5) Both professional and nonprofessional employees, unless a majority of the professional employees vote to petition for inclusion in the unit; or

(6) Employees of the Council of the District of Columbia.

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WASHINGTON DAILY NEWS
MARCH 10, 1971

Fire Department Torn by Race Charges

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Charges of racial discrimination and muted threats of violence are being hurled inside the D.C Fire Department, as the 1,450-man force reels under criticism from city officials, citizens and some of its own members.

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Earlier in the day there were two press conferences at the District Building, one by firemen of the Black Firemen's Progressive Association and one shortly after that by Capt. Joseph Granados, head of the firemen's union local No. 36.

The black firemen charged that the department uses a double standard toward white and black firemen, expressed, for example, in job discrimination "which is inherently and institutionally present in the policies and administration of the D.C Fire Department." They charged that this institutional discrimination" is far more damaging to its black members than were the former obvious indignities – restriction to segregated gas masks and beds for example – which they suffered."

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EVENING STAR
MARCH 17, 1971

Officials, Unions Respond to Report On Fire Dept. Bias

District officials and the president of the municipal firemen's union today appeared anxious to de-emphasize critical aspects of a D.C. Office of Human Rights report charging the fire department with hiring and promotional policies that result in racial discrimination.

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The report also called the union, a local of the International Association of Firefighters, "one of the greatest sources of resistance to equal employment opportunity in the fire department."

The union, the report continued, "is controlled by and in the interest of those who are in charge of the union and, in fact, of the fire department. Officers of the union have been officers in the department, and of course, have been white," the report said.

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Of the 1,412 firemen on the force in September, the report said only 23 percent were black in a city that is 71 percent black. Blacks generally hold lower ranks and are given less desirable assignments, it added.

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THE WASHINGTON
POST
JULY 17, 1971

Report Finds Race Unrest In Fire Dept.

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A six-month study of District's fire department by the city's office of human rights has found "little or no racial discrimination" in current hiring and promotion policies.

However, the 117-page report concludes that the department is "clearly plagued with rampant black-white hostility" and suffers from racially discriminatory practices in its administration and in the attitudes of some firemen.

It also concludes that, under the present seniority promotion system, it will "still be 30 to 40 years" before the effects of past discrimination in hiring can be eliminated.

The report urges the city to drop the current entrance examination, required of all prospective city policemen and firemen, and the high-school diploma requirement, saying these screen out black applicants.

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THE WASHINGTON
POST
AUGUST 26, 1981

City Told to Fill 60 to 70 Firefighter Jobs With Minorities

D.C. Human Rights Director Anita B. Shelton has ordered the city government to fill 60 to 70 available firefighting jobs with members of minority groups and to develop an affirmative action plan to give minorities "preference in all new hiring and promotions" until the percentage of minorities in the fire department approximates the percentage of minorities in the D.C. work force.

Shelton's order, which stems from a complaint by the predominantly black Progressive Firefighters Association, can be appealed to City Administrator Elijah B. Rogers. It was believed by the city's top personnel official to be the first time the District government has ever been ordered to impose a hiring quota to achieve greater racial balance.

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Shelton further ordered in an affirmative action plan, to be approved by her office. The plan would establish procedures for the fiscal year starting Oct. 1 in the areas of recruitment, selection and hiring, and would be designed to make sure that "minorities be given preference in all new hiring and promotions."

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The plan would have to remain in effect until "traditional patterns of racial segregation "in the department are eliminated until "minorities are no longer underrepresented at all grade levels,"

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THE WASHINGTON POST
FEBRUARY 26, 1988

Fire Dept. Overtime Cost Soar

$80 Million Total In 5 Years Reported

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D.C. Fire Chief Theodore R. Coleman said yesterday that the department had run up about $80 million in overtime costs in the last five years and proposed cutting the number of firefighters on engine companies from five to four as one way to reduce expenses.

The extraordinary overtime costs apparently have resulted from "manning formulas" to maintain five firefighters on engines, from use of firefighters in administrative positions and from shortages that have occurred under the department's affirmative action plan that requires that 60 percent of all new firefighters be black.

Since a court-ordered hiring freeze was imposed last March in a four-year-old racial discrimination lawsuit, those shortages have increased to 166 vacancies, including 99 firefighters, in a force that at full strength includes 1,374 uniformed firefighters, according to Coleman's testimony.

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"It's true–$80 million and it's all taxpayers' dollars," Rolark, chairman of the Judiciary Committee, said after Coleman's testimony.

"It's obviously not acceptable, but there's nothing we can do about it if [firefighters] have the right to file these lawsuits," said council member Jim Nathanson (D-Ward 3).

"The interesting thing is in the police department they haven't let these racial problems get in the way of running the department, but in the fire department it's legendary and it's costing the taxpayers a ton of money," Nathanson said.

The complex and protracted legal battle over alleged racial discrimination in the department began in 1980 when two black firefighters filed complaints with the D.C. Office of Human Rights.

Since then, the Justice Department and Local 36, which represents about 1,000

firefighters, including about 200 blacks, have also filed lawsuits in U.S. District Court.

In November, the full U.S Court of Appeals voted to rehear two cases challenging the affirmative action plans of the D.C. police and fire departments. Separate three-judge panels have upheld the police department's plan and overturned the fire department's.

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